BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

ASSIGNMENT OF ERRORS.

1. The Circuit Court of Appeals erred in passing on the issues of fact involved and in directing the entry of judgment. It thereby usurped the function of a jury and deprived the petitioners of a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

2. The Circuit Court of Appeals erred in holding that under the applicable law a submissible case of accidental death was not made. The applicable law was the Missouri law, but a submissible case was made under either the Missouri rule or the federal rule.

3. The Circuit Court of Appeals erred in holding that in a declaratory judgment action of this character the defendants assumed the burden of proof which they did not bear at the close of the plaintiff's case in chief simply by introducing evidence of the circumstances of the insured's death after their motion for directed verdict had been overruled.

4. The Circuit Court of Appeals erred in holding that the District Court had jurisdiction of an action for declaratory judgment by an insurer who had filed suit without denying liability and without investigating the case to determine liability.

5. The Circuit Court of Appeals erred in refusing to remand the cause for a new trial upon the issue of suicide and upon the issue of sanity.

STATEMENT.

The facts have been stated as fully as the limits of this petition will permit in the petition itself. For the sake of brevity, they will not be reiterated here.

ARGUMENT.

I.

The opinion of the Circuit Court of Appeals in passing on the issues of fact involved and in directing the entry of judgment constituted the usurpation of the functions of a jury and deprived the petitioners of a trial by jury as guaranteed by the Seventh Amendment to Constitution of the United States.

This case presents the precise situation which Mr. Justice Black predicted would arise in his opinion in the case of *New York Life Insurance Company v. Gamer*, 303 U. S. 161. If it was thought that the question discussed by Mr. Justice Black was not squarely presented in the *Gamer* case, there can be no doubt but that it is squarely presented in this case. This was an unexplained death by violent and external means without an eyewitness and without a suicide declaration. The law of Missouri permits, if it does not require, the inference of death by accident under these circumstances. Of this there can be no doubt. (See Point II of this brief.) Since the decision in *Erie Railroad Company v. Thompkins*, 304 U. S. 64, it has been settled beyond doubt that the law of the State of Missouri governs the right to recovery. (If this were not true, even the federal rule, as announced in the principle opinion of the *Gamer* case, *supra*, would require submission of this case to a jury.)

The Circuit Court of Appeals arbitrarily undertook to pass upon the question of fact concerning the actual character of the insured's death. It could not constitutionally undertake to perform the functions of a jury and determine the issues of fact involved, where, as here, the issue was one which should have been submitted to a jury under the law of Missouri and the law of the United States. In

holding that a case submissible to a jury under the state law may be held to be nonsubmissible and determinable by a federal appellate court is a direct violation of the doctrine of *Erie Railroad Company v. Thompkins,* 304 U. S. 64.

II.

Under the law of Missouri, the applicable law, a submissible case of accidental death was made.

It is well settled in Missouri that where there is an unexplained death by violent and external means, without an eyewitness, a submissible case of accidental death is made. *Brunswick v. Standard Accident Insurance Company,* 278 Mo. 154, 213 S. W. 45, 7 A. L. R. 1213; *Andrus v. B. M. A. Association,* 283 Mo. 44, 223 S. W. 70, 13 A. L. R. 779; *Reynolds v. Maryland Casualty Company,* 274 Mo. 83, 201 S. W. 1128; *Gilpin v. Aetna Life Insurance Company* (Mo. App.), 132 S. W. (2d) 683; *New York Life Insurance Company v. Gamer,* 304 U. S. 161.

The Missouri rule is summed up in the *Andrus* case, *supra,* as follows:

> "In this case the plaintiff can recover only if death was produced by accidental means. If the insured was sane, fully conscious of the effect of his act, and consciously intended to inflict death upon himself, then the death which he inflicted in pursuance of that intention was not accidental. In the recent case of Brunswick v. Standard Acci. Ins. Co., 278 Mo. 154, 7 A. L. R. 1213, 213 S. W. 45, this court reviewed the authorities at great length in construing a clause similar to the one under consideration here. The following rules may be deduced from the holding in that case:
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> "(a) If the deceased committed suicide while insane, his beneficiary could recover, and §6945 removes the defense of suicide.
>
> "(b) If the insured, while sane, for the purpose of

committing suicide, intentionally swallowed poison, his consequent death was not accidental within the meaning of the policy. 213 S. W., loc. cit. 47.

"(c) After it was shown that the insured swallowed the poison, and the question arose whether the act was accidental or intentional, a presumption arises from the love of life, in the absence of evidence upon the point, that it was accidental, and this presumption obtained until evidence was adduced in explanation of the act. 213 S. W., loc. cit. 49, 50.

"(d) If there was evidence upon the point in explanation of the manner in which the poison was taken, then the presumption ceased to exist, and it became a question of fact whether the death, self-inflicted, was accidental or intentional. Unless the evidence shows conclusively that the insured was sane, and intentionally took his own life, so that the court might declare as a matter of law that the death was intentional, it was a question for the jury, from such evidence as was produced, to say whether the insured was sane or insane at the time, and whether, if sane, the death was inflicted intentionally or accidentally.

"(e) The burden was on the defendant to prove that the death under such circumstances was intentional, and not accidental; that is, the burden would be upon the defendant, in a case of suicide, to prove that the insured was sane, and committed the act which took his life with the intention of committing suicide.

"It may be added that in the Brunswick Case there was no evidence indicating that the insured was insane, and there was considerable evidence indicating that he took cyanide of potassium with the intention of committing suicide. It was held that it was a question for the jury, and the case should be submitted to the jury. See, also, Reynolds v. Maryland Casualty Co., 274 Mo., loc. cit. 97, 201 S. W. 1128; Scales v. National Life & Acci. Ins. Co., ... Mo. ..., 212 S. W., loc. cit. 9."

All the Missouri cases cited above clearly declare the position that where the death is by violent and external means and there is no prior declaration of suicide and no eyewitness the case should be submitted to a jury.

"If the evidence in favor of suicide is wholly circumstantial, then it ought to be such and of such extent as to negative every reasonable inference of death by accident." *Brunswick* case, *supra*. In this case the Court assumed that there was blood in both barrels of the gun, and held this to conclusively show suicide. There was conflicting testimony on this point. Nevertheless, if it were a fact undisputed, no appellate court has the constitutional power to determine the issue of suicide by grasping an isolated inconclusive circumstance as a lever to overthrow a mountain of circumstantial evidence.

The record shows that two of the respondent's own witnesses saw blood in only one barrel of the gun (Coroner Toalson, R. 42; Patrolman Ridgeway, R. 207). The petitioners showed that the insured could not have discharged the gun, when held against his body at the angle indicated by the entry of the shot, intentionally (R. 183). In the Missouri courts this case would have been submitted to a jury under the authorities above. The federal system should not attempt to reach a contrary result. *Erie* case, *supra*.

The Circuit Court of Appeals erred in undertaking to resolve all issues of fact which should have beeen submitted to a jury. It thereby offended against the Seventh Amendment of the Constitution.

III.

The Circuit Court of Appeals erred in holding that in a declaratory judgment action of this character the defendants assumed the burden of proof which they did not bear at the close of the plaintiff's case in chief, simply by introducing evidence of the circumstances of the insured's death, after their motion for directed verdict had been overruled.

The defendants, petitioners herein, assumed the burden of proof which originally rested on the respondent, plaintiff, simply by introducing evidence of the circumstances of the insured's death after their motion for directed verdict had been overruled. The opinion of the Court of Appeals determines an important question of federal procedure in a manner that requires the exercise of the supervision of this Court. This point involves the broader question of the burden of proof generally in suits for declaratory judgments.

In holding that the petitioners produced evidence on the issue of insanity "on the theory that the burden of producing evidence on that issue had shifted to them," the Court announced a novel and vicious doctrine. As shown in the statement of this petition, the record clearly indicates that the petitioners insisted at all times that the burden of proof and the burden of the evidence was upon the respondent. It requested and secured a ruling at the outset of the trial. The Court ruled that the burden of proof in this case rested upon the respondent insurer (R. 19). After the motion for directed verdict at the close of the plaintiff's case was overruled the petitioners produced evidence of the circumstances surrounding the death which the respondent had failed to produce. By producing this evidence the petitioners are said to have assumed a burden which originally rested upon respondents. It is an incorrect and vicious doctrine here announced that the

defendant who produces evidence assumes the burden of proof or burden of the evidence which did not rest upon him. Such a ruling should be corrected by this Court.

The common law and Federal Rule 50 permit the adverse party to offer proof after the plaintiff's case is in and his motion for directed verdict has been overruled.

The Circuit Court of Appeals stated that by offering substantial evidence to show a possible theory of accidental death the presumption or inference of accident usually obtaining was forsaken and dissipated. The record shows, as set out in the statement of the petition, that the petitioners insisted throughout that they were entitled to the benefit of inference of accident in this circumstantial case. To hold that by offering evidence of the circumstances and a possible theory of death consistent with the inference of accident the burden is shifted is a novel and vicious doctrine which, in substance, deprives the petitioners of their constitutional right to trial by jury. We believe that this certainly deserves the consideration of this Court. In essence it involves the important questions of burden of proof and of the evidence in actions for declaratory judgments.

IV.

The Circuit Court of Appeals erred in holding that the District Court had jurisdiction of an action for declaratory judgment by an insurer who had filed suit without denying liability and without investigating the case to determine liability.

The Circuit Court of Appeals erred in holding that an actual justiciable controversy exists where an insurer upon receipt of claim files suit without communicating with the claimant its position and without investigating the merits of the claim so as to take a position. This question of lack of jurisdiction was raised by motion at the close

of the plaintiff's case in chief (R. 34). The pleadings had made an issue of the existence of an actual controversy and no proof had been produced by the plaintiff, respondent here. The question was raised in the Court of Appeals by motion to dismiss (R. 361-368).

Jurisdiction to render declaratory judgments are limited to cases of actual controversy (49 Stat. 1027, 28 U. S. C. A., Sec. 400; *Aetna Life Insurance Company v. Haworth,* 300 U. S. 227. Art. III, Sec. 2, Constitution of the United States).

The burden of proving the existence of the actual controversy rests upon the party bringing the action. Both the principal opinion of Judge Gardner and the separate concurring opinion of Judge Sanborn agree upon this point.

Judge Sanborn said: "My opinion is that the burden of proving the existence of the controversy was on the plaintiff * * *" Judge Gardner, in his opinion, says: "It is a fundamental rule that the burden of proof in its primary sense rests upon the party who, as determined by the pleadings, asserts the affirmative of an issue * * *"

The appellant insurer totally failed to prove the existence of an actual controversy.

The only evidence offered by the appellant insurer to prove the existence of an actual controversy and to make its *prima facie* case on the merits were the policies involved and the coroner's certificate of death. Here absolutely no showing was made concerning the existence of an actual controversy as was made in *Aetna Life Insurance Company v. Haworth*, 300 U. S. 227, and *New York Life Insurance Company v. Roe* (C. C. A. 8), 102 F. (2d) 28. The record is devoid of any proof showing the existence of an actual controversy ripe for judicial determination. Because of this failure of proof, the District Court should have sustained the motion to dismiss. Neither the

District Court nor the Court of Appeals had any jurisdiction to determine this case on the merits.

An actual controversy does not exist unless "prior to the suit, the parties take adverse positions with respect to their obligations."

This suit was filed December 20, 1938. Never, prior to that time or since, has the appellant insurer denied liability to the appellees. The mere filing of the suit is all that can be found concerning the existence of the controversy. But the law requires that the parties take adverse positions with respect to their obligations before the filing of suit. No such thing occurred here. A plaintiff in a declaratory judgment action may not just file suit and proceed leisurely to investigate the claim and then to offer evidence on the merits where the existence of the controversy is denied. *Aetna Life Insurance Company v. Haworth, supra; New York Life Insurance Company v. Roe, supra.*

This record does disclose, however, that the insurance company did not make its investigation until about two months after the suit was filed (see R. 70, 66, 91), when long after the filing of this suit occurred, petitioners permitted disinterment of the body to investigate and substantiate their claim. The insurance company filed this suit without denying liability and then proceeded to investigate it. It used the process of the District Court to investigate by deposition, March 10, 1939, about three months after filing suit (R. 132). There was no jurisdiction to hear the cause and the suit was improperly filed.

It is clear that the *Aetna Life Insurance Company v. Haworth, supra,* ruled an entirely different situation. In the *Haworth* case, the parties took definite adverse positions, announced to each other before the suit was brought and, as pointed out in the Roe case, the beneficiary made

repeated claims over a period of years against the company but failed to bring any action after a denial of his claim. In the Aetna case this required the company to maintain reserves and to take cognizance of a possible outstanding liability which the beneficiaries would not cause to be adjudicated by filing suit.

In this case the action was brought without a denial of liability. In the *Haworth Case, supra,* the opinion reveals the following:

> "There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract. *Prior to this suit, the paries had taken adverse positions with respect to their existing obligations.* Their contentions concerned the disability benefits which were to be payable upon prescribed conditions. On the one side, the insured claimed that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums and was entitled to the stipulated disability benefits and to the continuance of the policies in force. The insured presented this claim formally, as required by the policies. It was a claim of a present, specific right. On the other side, the company made an equally definite claim that the alleged basic fact did not exist, that the insured was not totally and permanently disabled and had not been relieved of the duty to continue the payment of premiums, that in consequence the policies had lapsed, and that the company was thus freed from its obligation either to pay disability benefits or to continue the insurance in force. Such a dispute is manifestly susceptible of judicial determination." (Italics ours.)

It is very definitely asserted by Borchard that "* * * there is no justiciable issue until he (the plaintiff) trans-

lates his doubt into a claim of right and asserts it against a defendant having an interest and contests it." Borchard, Declaratory Judgments, page 32. Here there was no assertion of any claim of right by this plaintiff against these defendants before the commencement of this action.

It is further clear that until there is an "actual antagonistic assertion and *denial of right,*" there is no "actual controversy." Borchard, Declaratory Judgments, pages 35, 254.

In this case the respondent instituted this action without a word and began a "fishing expedition." Under these circumstances an action for declaratory judgment will not lie.

To hold that there is jurisdiction in this proceeding is to violate the Constitution of the United States limiting the jurisdiction of the courts of the United States to "cases" and "controversies." Further it violates the Federal Declaratory Judgments Act which limits jurisdiction thereunder to cases of actual controversy. It would encourage the practice by the insurance companies of rushing in and filing a suit before ever investigating them and without denying liability to the claimant. Investigations then proceed after the filing of the suit. Certainly such a practice is not to be tolerated.

Jurisdiction Can Be Raised at Any Time.

It is well settled that lack of jurisdiction in a declaratory judgment suit may be raised at any time; here it was raised at the first opportunity. *Garden City News v. Hurst,* 129 Kan. 365, 282 Pac. 120; *Taylor v. Haverford Twp.,* 299 Pa. 402, 149 Atl. 639; *Heller v. Shapiro,* 208 Wis. 310, 242 N. W. 174, 87 A. L. R. 1201.

V.

The Circuit Court of Appeals erred in refusing to remand the cause for a new trial upon the issue of suicide and upon the issue of sanity.

The Circuit Court of Appeals, in the concluding paragraph of Judge Gardner's opinion (R. 353) holds that the cause should not be retried, but that judgment should be entered for the plaintiff despite the fact that in the motion for rehearing and motion to remand the petitioners offered to supply on retrial a formal opinion of insanity found lacking by the Court. This opinion is based upon purely uncontroverted facts found in the record and stated in the opinion (R. 378-414).

The Circuit Court of Appeals for the Eighth Circuit had previously held that rule 50 *required* the entry of judgment for the appellant without retrial where it made a motion for directed verdict or for a new trial under rule 50. *Massachusetts Protective Association, Inc., v. Mouber*, 110 Fed. (2d) 203; *Louden v. Denton*, 110 Fed. (2d) 274. Following these cases the Court of Appeals assumed that rule 50 *required* it to direct entry of judgment without remanding the cause. This is likewise an important question of federal practice which should be determined. We do not believe that it was the intention of the federal rules to make any changes in the practice of remanding cases to permit the technical inadequacies of proof to be supplied. In fact, rule 50 expressly permits the judgment to be reopened, stating that the Court may "* * * order a new trial or direct entry of judgment as if the requested verdict had been directed."

The Circuit Court of Appeals for the Eighth Circuit has unduly restricted its own right to remand for a new trial where a motion under rule 50 (b) is granted. This is the third case where this misconstruction has been ap-

plied. See the *Mouber* case, *supra,* and the *Denton* case, *supra.* The question is sufficiently important to require the exercise of this Court's judicial supervision.

CONCLUSION.

It is, therefore, respectfully submitted that this cause is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law, both as to substance and procedure, may be properly and authoritatively defined, and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed in order that justice may be done to the petitioners; and that to such an end a writ of certiorari should be granted and this Court should review the opinion of the United States Circuit Court of Appeals for the Eighth Circuit and finally reverse it.

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